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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

FREDERICK WAYNE SMITH,  
Petitioner,  
v.  
DAVE DAVEY, Warden,  
Respondent.

Case No. LA CV 16-2621 AB (JCG)

**ORDER ACCEPTING REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE AND  
DENYING CERTIFICATE OF  
APPEALABILITY**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus (“Petition”), the Magistrate Judge’s Report and Recommendation (“R&R”), Petitioner’s Objections to the R&R, and the remaining record, and has made a *de novo* determination.

In his Objections, Petitioner contends that he is entitled to equitable tolling on the grounds that, “[a]t the time in question[,] petitioner was mentally impaired . . . .” (See Objections at 5-6.)

The Court finds that Petitioner’s untimely Petition is not saved by equitable tolling, for three reasons.

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1 First, Petitioner's claim is belied by the record. While Petitioner vaguely asserts  
 2 that his state court petitions were delayed by various incapacitating "mental[]  
 3 impair[ments]," the record reflects that Petitioner submitted an "appeal" to the  
 4 California Board of Prison Terms ("Board") in April 2014, more than three months  
 5 before his AEDPA limitation period expired. [See Dkt. No. 1 at 12-14.] Notably,  
 6 Petitioner fails to explain how he was able to prepare and submit this grievance, but  
 7 was too "impaired" to present his habeas claims to the courts. As such, "Petitioner's  
 8 own conduct . . . contradicts his current claim that his mental incompetence rendered  
 9 him incapable of timely filing the instant federal habeas petition." See *Nivette v.*  
 10 *Marshall*, 2010 WL 4323030, at \*6 (E.D. Cal. Oct. 26, 2010) (collecting cases).

11 Second, assuming *arguendo* that Petitioner is entitled to equitable tolling  
 12 through August 5, 2014 (*i.e.*, the date Petitioner filed his first state habeas petition), an  
 13 additional *thirteen months* passed between the California Supreme Court's rejection of  
 14 Petitioner's final state petition on February 23, 2015, and Petitioner's filing of the  
 15 instant Petition on April 11, 2016. [See Dkt. No. 1 at 28, 34]; (*see also* Objections  
 16 at 3-4). As such, the Petition is untimely, in any event. See 28 U.S.C. § 2244(d)(1).

17 Third, and relatedly, because Petitioner utterly fails to account for the latter,  
 18 thirteen-month delay in filing, the Petition must be dismissed on the grounds that  
 19 Petitioner has failed "to show diligence through the time of filing." See *Luna v.*  
 20 *Kernan*, 784 F.3d 640, 651 (9th Cir. 2015).

21 Finally, in his Objections, Petitioner includes a vague, conclusory assertion of  
 22 "factual innocence." (Objections at 6.) As a rule, a federal habeas petition's  
 23 untimeliness may be excused where the petitioner presents a credible claim of actual  
 24 innocence. *McQuiggin v. Perkins*, 133 S. Ct. 1913, 1928, 1931 (2013). To prevail on  
 25 such a claim, the petitioner must "support his allegations of constitutional error with  
 26 new reliable evidence – whether it be exculpatory scientific evidence, trustworthy  
 27 eyewitness accounts, or critical physical evidence – that was not presented at trial."  
 28 *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Here, preliminarily, petitioner's assertion of

1 “factual innocence” is inapposite, insofar as Petitioner seeks to compel the Board to  
 2 perform a commutation review, and does not purport to challenge the constitutionality  
 3 of his conviction. [See generally Dkt. No. 1.] In any event, Petitioner fails to submit  
 4 any evidence – let alone “new reliable evidence” – in support of his bare assertion. See  
 5 *Schlup*, 513 U.S. at 324. As such, his claim of “factual innocence” is unavailing. See  
 6 *id.*; *Fernandez v. Long*, 2013 WL 5486779, at \*12 (C.D. Cal. Sept. 27, 2013)  
 7 (“Petitioner has not presented any actual evidence, let alone any new reliable evidence,  
 8 that demonstrates that he is actually innocent.”).

9 Accordingly, IT IS ORDERED THAT:

- 10 1. The Report and Recommendation is approved and accepted;
- 11 2. Judgment be entered denying the Petition and dismissing this action with  
 12 prejudice;<sup>1</sup> and
- 13 3. The Clerk serve copies of this Order on the parties.

14 Additionally, for the reasons set forth in the Report and Recommendation and  
 15 above, the Court finds that Petitioner has not shown that “jurists of reason would find  
 16 it debatable whether”: (1) “the petition states a valid claim of the denial of a  
 17 constitutional right”; and (2) “the district court was correct in its procedural ruling.”  
 18 See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Thus, the Court declines to issue a  
 19 certificate of appealability.

20  
 21  
 22 DATED: September 6, 2016



23 HON. ANDRÉ BIROTTE JR.  
 24 UNITED STATES DISTRICT JUDGE

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 28 <sup>1</sup> As such, Petitioner’s “Motion for Appointment of Counsel,” [Dkt. No. 7], is **DENIED AS MOOT.**